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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ANTONY ALEXANDER BLAREK II, AND
FRANK V. PELLECCHIA,
Petitioners,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are interior designers and decorators who provide decorating services to a leader of the Colombian drug cartel guilty of conspiracy to participate in the leader's narcotics trafficking enterprise if they know that money they have received from their client to make decorating purchases and in compensation for their services is or may be narcotics-related?

2. In light of this Court's decisions in Reves v. Ernst & Young, 507 U.S. 170 (1993), and United States v. Salinas, 118 S. Ct. 469 (1997), what must a person agree to or do to be criminally liable for conspiracy to violate 18 U.S.C. § 1962(c), and which (if any) of the Circuits' conflicting views on the scope of conspiratorial liability under RICO is correct?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Antony Alexander Blarek II and Frank V. Pellecchia petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit has been designated a summary order not for publication; it is reproduced in the Appendix at App.1.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was filed on December 23, 1998. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pursuant to Rule 14(1)(f) of the Supreme Court Rules, and because they are lengthy, the statutes at issue are set forth verbatim in the Appendix, at App. 8 to App. 18.

STATEMENT OF THE CASE

Petitioners Antony Alexander Blarek II and Frank V. Pellecchia, interior designers and decorators, were charged with conducting and participating in the affairs of the Santacruz faction of the Cali drug cartel, and conspiring to do so, in violation of 18 U.S.C. §§ 1962(c) and 1962(d).[1] (App. 8-9)

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[1] Both were also charged with (and convicted of) conspiring to launder monetary instruments in violation of 18 U.S.C. §§ 371 and 1956(h); and Petitioner Blarek was charged

Following a jury trial in the Eastern District of New York, they were acquitted of the substantive RICO count, but convicted on the RICO conspiracy count.[2]

The historical facts were largely undisputed; what was disputed was the defendants' intentions and the legal consequences of their acts. In 1979, Blarek, a successful interior designer living and working in the Miami area visited Cali, Columbia with a fellow designer who had relatives in that country. There, having admired a particularly impressive house that was under construction, they met its owner, Jose Santacruz Londono, and his wife, Amparo. Following this and several other meetings, Blarek and his friend were retained to develop a plan to decorate the house being built. After further discussions, and a scaling down of the budget at Santacruz' request, they were retained to execute the plan, selecting and purchasing furnishings and fabrics from a variety of vendors, arranging for delivery, and supervising installation. Blarek and his friend made a profit or commission well within the range of 25 percent to 40 percent that is standard for designers.

In 1981, Santacruz contacted Blarek and retained him to design a new office for him in Cali. At around the same time,

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with (and convicted of) a single count of traveling in interstate commerce with intent to distribute the proceeds of a narcotic enterprise and distributing such proceeds, in violation of 18 U.S.C. § 1952(a)(1).

[2] Departing downward from the applicable sentencing guidelines, the district court sentenced Blarek to 68 months and a fine of over $300,000, and Pellecchia to 48 months imprisonment. Pursuant to a stipulation of settlement with the government, forfeitures were ordered which, with the fine, appropriated to the government virtually the entire net worth of the Petitioners.

Petitioner Pellecchia became Blarek's business and life partner. From that point on, the two of them worked together on a number of design projects for Jose Santacruz, including an apartment for Santacruz' wife in Bogota, several apartments in Cali for use by the family and its guests, and a number of homes and apartments for two of Santacruz' mistresses. For these projects, Blarek and Pellecchia conceived designs, made drawings, selected fabrics, draperies, and accessories, retained vendors and craftsmen to execute their designs, consulted with architects, and traveled to Colombia to supervise installation and finishing. They received typical, that is, substantial, fees or commissions as designers, and functioned in ways that were entirely normal for design and decorating professionals.[3] Their work was of the highest quality, and they continued to work as "decoradores" for Santacruz.

From 1986 through 1990, they worked on a ranch house being constructed for Amparo Santacruz, and from 1991 on, an extensive expansion and renovation of the original house in Cali. The last project was not completed because Santacruz was arrested by the Colombian authorities, and was later killed in a shootout with police.

Santacruz had been a large scale narcotics trafficker. In fact, he was one of the most important figures in the Colombian cocaine cartel, about which DEA agents and former members of his narcotics operation testified at trial. There was also evidence at trial that at some point, the Petitioners knew or had reason to believe that Santacruz was involved in the narcotics trade. Indeed, in 1981, DEA agents advised Petitioner Blarek that Santacruz was involved in drug trafficking, and in 1991

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[3] For example, they hid the true identity of their client from vendors with whom they dealt, a common practice with clients who are rich or famous, and they kept track of projects by assigning project numbers to them rather than client names.

Santacruz' picture appeared on the cover of Time magazine, where he was depicted as the head of the Cali cartel.

The indictment upon which the Petitioners were tried charged that the Petitioners themselves conducted and participated in the conduct of the affairs of the Santacruz Faction of the Cali Cartel -- which was named as the racketeering enterprise -- through a pattern of racketeering activity and, in a separate count, that they conspired to do so. The indictment set forth 154 racketeering acts, as part of both the substantive and RICO counts. The predicate acts charged included laundering of monetary instruments (18 U.S.C. § 1956(a)(1)(B)(i)); engaging in transactions in drug proceeds in excess of $10,000 (18 U.S.C. § 1957); and interstate travel in aid of racketeering activity (narcotics trafficking) (18 U.S.C. § 1952(a)(1) and 21 U.S.C. §§ 846, 841). All of these predicate acts involved Petitioners' (1) receipt of money from Santacruz or others acting on his behalf – either in cash or by wire transfer from banks which were, for the most part, outside the United States; (2) purchase of goods and services for Santacruz for the various design projects, either with cash or by check; (3) deposit of checks or the writing of checks to pay for goods and services related to the various design projects; and (4) travel in interstate commerce to make purchases in connection with those design projects.

In support of the charges, the government introduced evidence at trial that, over the course of years during which Santacruz was their client, the Petitioners had, on a number of occasions, received monies, and had spent it, in connection with the design projects they had been retained to execute, and had been paid by Santacruz for the design services that they had provided. In attempting to bring these activities within RICO and to state claims against the two designers for RICO offenses, the indictment alleged that Santacruz "wished to ... utilize the vast sums of illegal drug proceeds" his narcotics operation generated. The indictment characterized this as an objective "of

the racketeering enterprise" itself, and alleged that the defendants furthered this objective by their actions. (Superseding Indictment ¶ 14) The indictment made it sound like the defendants utilized drug proceeds to further drug activities, even though every penny they spent was a penny forever removed from the drug trade. This was a prosecution for helping someone spend his money on non-narcotics-related activities.

The defense at trial was that Petitioners' provision of professional services to Santacruz, including the purchasing of high end furnishings and household goods for him, were intended to further -- and did further -- only Santacruz' personal consumption goals, not the goals of the narcotics trafficking operation which he headed and which was the RICO enterprise. Accordingly, it was their position that they were not guilty of a substantive crime under RICO, or of RICO conspiracy.

The jury, however, convicted on the RICO conspiracy count, though it acquitted on the substantive charge.

On the appeal, defendants argued that, as a matter of fact and of law, the evidence was not sufficient to establish their liability, as conspirators, under RICO. As they had argued at trial, they urged that the evidence established only that they furthered and intended to further the personal consumption goals of Santacruz by assisting him to satisfy his taste, and the desires of his wife and mistresses, for luxury items and other voluptuary pleasures. They argued that, even if they engaged in proscribed financial transactions involving narcotics proceeds or otherwise violated federal law in catering to Santacruz' personal consumption activities, they could not be found guilty of conspiring to conduct or participate in the conduct of the Cali cartel's narcotics trafficking, as charged.[4]

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[4] Defendants also argued that prejudicial spillover from the invalid RICO conspiracy conviction tainted the convictions

The Court of Appeals for the Second Circuit affirmed the convictions by unpublished summary order. The Court "disagreed" with the defendants' position that they did not conspire with Santacruz but instead merely assisted him with his personal consumption. In explaining its disagreement, the Court stated:

> There is considerable evidence in the record to show that the Appellants knew Santacruz was a drug dealer and that the money they were spending for him was drug money. Moreover, the size and manner of the cash transfers to Blarek and Pellecchia, not to mention the surreptitious conduct of the designers concerning their transactions with Santacruz, could all amply support the inference that the Appellants conspired with Santacruz to aid his enterprise's drug business through money laundering.

(App. 5) Petitioners seek review on certiorari of an important question this case presents.

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on the other counts. The Court of Appeals, finding the RICO conspiracy conviction valid, found the spillover argument meritless. Although the Petitioners raise, in this Court, only a challenge to the RICO conspiracy count, they submit that, if they are entitled to a remand on the RICO conspiracy count, the entire case should be remanded for consideration of the validity of the convictions on the other count or counts.

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES, IN A COMPELLING FACTUAL CONTEXT, A QUESTION CONCERNING THE SCOPE OF CONSPIRATORIAL LIABILITY UNDER RICO THAT HAS VEXED AND DIVIDED THE FEDERAL COURTS

This case raises a fundamental question concerning the scope of conspiratorial liability under RICO. The question is whether a person may be guilty of conspiracy to participate in a narcotics enterprise, and thus guilty of conspiracy to violate RICO, by helping the head of that enterprise spend his money on non-narcotics-related activities. This case thus presents, in a compelling factual context, a question that has divided and vexed the federal Courts of Appeals.

To be liable for RICO conspiracy, what (if anything) must the defendant do or agree to? The answer to that question determines who among the persons who may have some connection to, or dealing with, a racketeer or racketeering enterprise can properly be charged with RICO conspiracy. It also determines what the jury must be instructed to find (and must find) in order to convict; and whether a guilty verdict is supported by legally sufficient evidence. Yet, the question is one on which the Circuits are sharply split.

RICO's key substantive provision makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ...." 18 U.S.C. § 1962(c). (App. 8) Section 1962(d) renders it unlawful to conspire to violate that section. The essence of a conspiracy is, of course, an agreement. But

what is the nature of the criminal agreement where RICO is concerned? And what, if anything, must an individual do or agree to in order to himself become liable for RICO conspiracy. Because RICO has several layers, the answer is far from obvious. The federal courts have taken varying approaches and reached conflicting results, giving rise to opportunities for forum-shopping.[5]

In United States v. Neapolitan, 791 F.2d 489, 499 (7th Cir.), cert. denied, 479 U.S. 940 (1986), the Seventh Circuit provided an early answer in an expansive and scholarly treatment of the question:

> From a conceptual standpoint a conspiracy to violate RICO can be analyzed as composed of two agreements (in reality they would be encompassed by the same manifestations of the defendant): an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of at least two predicate acts. Thus, a defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise, and neither is the defendant who agrees to the commission of two criminal acts but does not consent to the

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[5] In fact, 3500 material produced in this case revealed that the Drug Task Force in San Francisco declined to prosecute this case because a conviction was thought to be "extremely unlikely." As demonstrated infra, under Ninth Circuit law, defendants would not be guilty of RICO conspiracy. The law in the Second Circuit is different and that is where this case was brought, although the Petitioners' contacts with the Eastern District of New York were minimal.

> involvement of an enterprise. ... If either aspect of the agreement is lacking then there is insufficient evidence that the defendant embraced the objective of the alleged conspiracy. Thus, mere association with the enterprise would not constitute an actionable § 1962(d) violation. In a RICO conspiracy, as in all conspiracies, agreement is essential.

(citations and footnote omitted)

Not all courts followed the Seventh Circuit's analysis, and several Circuits, including the Second Circuit, construed the statute more narrowly and required that defendants personally agree to commit two or more racketeering acts. See United States v. Sanders, 929 F.2d 1466, 1473 (10th Cir.), cert. denied, 502 U.S. 846 (1991); United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

Following this Court's 1993 decision in Reves v. Ernst & Young, 507 U.S. 170 (1993), a number of courts re-examined conspiratorial liability under RICO. Reves addressed the scope of "outsider" liability for substantive RICO crimes under § 1962(c) -- in that case the liability of accountants. Adopting a narrow construction of the statute based on the plain meaning of the statute and its legislative history, Reves held that § 1962(c) reaches only those who "participate in the operation or management of the enterprise itself." 507 U.S. at 185. Specifically, the Court concluded that the term "conduct" as used in § 1962(c) required that the defendant be found to exercise "some degree of direction" over the enterprise, and that the word "participate" required "some part in that direction." Id. at 178, 179. Accordingly, this Court affirmed the lower court's view that an accounting firm, engaged in the valuation of a farming

cooperative based on yearly audits and financial statements, could not be held civilly liable to the cooperative's note holders under § 1962(c) upon the cooperative's filing for bankruptcy. Id. at 186. The Reves Court indicated that "liability under § 1962(c) is not limited to upper management," but declined to decide "how far § 1962(c) extends down the ladder of operation." Id. at 184 & n.9.

The federal courts have divided on the question whether Reves' "management or control" test likewise applies to the crime of RICO conspiracy. The Seventh Circuit, the first Court of Appeals to consider the question, concluded that Reves did not change the law of RICO conspiracy. In United States v. Quintanilla, 2 F.3d 1469, 1484-85 (7th Cir. 1993), it held that RICO conspiracy requires "only an agreement to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity." Under this approach, "it is only necessary that the defendant agree to the commission of two predicate acts on behalf of the conspiracy." Id. at 1484 (emphasis added). The Second Circuit agreed with the Seventh that Reves did not alter the law of RICO conspiracy. Adhering to its previous position (but purporting to rely on Neopolitan), it held that, to be guilty of RICO conspiracy, defendant must have "'embraced the objective of the alleged conspiracy' and agreed to commit two predicate acts in furtherance thereof." United States v. Viola, 35 F.3d 37 (2d Cir. 1994), cert. denied, 513 U.S. 1198 (1995), quoting Neapolitan, 791 F.2d at 499.

The Third Circuit, the next Court of Appeals to consider Reves' impact on RICO conspiracy, saw the matter quite differently. Disagreeing with both the Seventh and the Second Circuit that Reves had no effect on conspiratorial liability, the Third Circuit recognized that "courts risk eviscerating Reves by blanketly approving conspiracy convictions when substantive convictions under 1962(c) are unavailable." United States v. Antar, 53 F.3d 568, 581 (3d Cir. 1995). The Court noted the

force of the argument that, "If Congress' restriction of section 1962(c) liability to those who operate or manage the enterprise can be avoided simply by alleging that a defendant aided and abetted or conspired with someone who operated or managed the enterprise, then Reves would be rendered almost nugatory." Id., quoting David B. Smith & Terrance G. Reed, Civil Rico, § 5.04 at 5-39 (1994). Striving to avoid eviscerating Reves, the Third Circuit concluded:

> [A] distinction can be drawn between, on the one hand, conspiring to operate or manage an enterprise, and, on the other, conspiring with someone who is operating or managing the enterprise. Liability under section 1962(d) would be permissible under the first scenario, but, without more, not under the second. ... The distinction we draw derives directly from 18 U.S.C. § 1962(d) which provides that it is "unlawful for any person to conspire to violate" sections 1962(a), (b), or (c).

Id.

In United States v. Starrett, 55 F.3d 1525 (11th Cir. 1995), cert. denied, 517 U.S. 1111 (1996), the Eleventh Circuit, without analysis and without mention of Antar, opted to follow the Second and Seventh Circuit's approach, and affirmed a RICO conspiracy conviction along with a conviction for the substantive RICO offense.[6]

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[6] More recently, however, the Eleventh Circuit approved a jury instruction that permitted a RICO conspiracy conviction if the jury found that the defendant "agreed to conduct or to participate in the affairs of the enterprise either by agreeing personally to commit at least two predicate acts or by agreeing to the overall objective and knowing that others were conspiring

The Ninth Circuit, however, in a civil RICO case, has joined the Third in recognizing the impact of Reves, and requiring more: "We have defined conspiracy in the RICO context as an agreement to conduct or participate in the affairs of an enterprise and an agreement to the commission of a least two predicate acts. To uphold the verdict, after Reves, there must have been "substantial evidence that defendant agreed to have 'some part in directing [the enterprise's] affairs.' ... Evidence that [the defendant] knew of ... the scheme, benefitted from the scheme, or even conspired with Fletcher to violate the tax code would not be enough." Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1128 (9th Cir. 1997), quoting Neapolitan, 791 F.2d at 499.[7]

Most recently, the Fifth Circuit, announcing that it was following the Second and Seventh Circuit's lead, held that, to prove a RICO conspiracy, the government must establish (1) that two or more people agreed to commit a substantive RICO offense, and (2) that the defendant knew of and agreed to the overall objective of the RICO offense. United States v. Posada-Rios, 158 F.3d 832 (5th Cir. 1998). The Fifth Circuit found support for this position in this Court's decision in United States v. Salinas, 118 S. Ct. 469 (1997), which repudiated the notion that, to be liable for RICO conspiracy, a defendant must have

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to participate in the same enterprise through a pattern of racketeering." United States v. Brazel, 102 F.3d 1120 (11th Cir.), cert. denied, 118 S. Ct. 79 (1997).

[7] The District of Columbia Circuit recognized the split in the Circuits, but declined to take sides, reasoning that the conviction under review would be valid under either approach. See United States v. Thomas, 114 F.3d 228 (D.C. Cir.), cert. denied, 118 S. Ct. 635 (1997). The question is still an open one in that Circuit. See United States v. Hoyle, 122 F.3d 48, 50 n.3 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 1335 (1998).

agreed that he would himself commit two predicate acts. Salinas emphasized that normal conspiracy principles apply to RICO conspiracies, and explained that

> A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion.

Id. at 477 (emphasis added).

In Petitioners' case, the panel on appeal focused on evidence tending to show Petitioners' knowledge of Santacruz' drug activities[8] and quoted the underlined language from Salinas, suggesting that that provided the standard for assessing the validity of the convictions in this case. Salinas, however, does not address the pre-existing split in the Circuits regarding the significance of Reves. Beyond making clear that the defendant need not agree to commit predicate acts himself, Salinas sheds little light on what it is the defendant must do or agree to. Salinas' "intend to further" or "adopt the goal" language could be read to support the proposition that a RICO defendant need not agree to anything so long as an agreement, among or between

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[8] A person's knowledge of illegal activity does not make him guilty of conspiracy to engage in that activity, even if his actions further the object of a conspiracy. See United States v. Falcone, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205 (1940) (sale of sugar to illicit distillers). In the words of Learned Hand, "[H]e must in some sense promote their venture himself, make it his own, have a stake in its outcome." 109 F.2d at 581.

others, existed, with which he associated himself in some way.[9]

If that is what Salinas means, then Reves is of little significance. Reves' recognition that substantive RICO casts a relatively small net is of little moment if RICO conspiracy -- a crime just as serious as the substantive offense -- casts an enormous one. Petitioner submits that the Third and the Ninth Circuits were, therefore, correct in holding that Reves operates to limit conspiratorial liability under RICO too. Salinas' holding – that an alleged conspirator need not himself have agreed to commit at least two predicate acts – and its reliance on general conspiracy principles in reaching that conclusion certainly do not compel a contrary result.

As argued in the Court below, evidence that Petitioners agreed to conduct the affairs of the Santacruz faction of the Cali cocaine cartel – that is, to manage or direct its affairs – was woefully lacking. The evidence of Petitioners' lack of involvement in the actual operation of any part of the Cali drug cartel is overwhelming and undisputed, and came from the government's witnesses as emphatically as from Petitioner Blarek himself. Indeed, the idea that these two interior decorators conspired to play such a role is laughable. Under the rule of law that exists in the Ninth and Third Circuits, Petitioners' RICO conspiracy convictions could not stand; the government has never claimed otherwise.

Even if there were no conflict in the Circuits, or Salinas itself could be read to define the requisites for conspiratorial liability under RICO, the law in this area would still be in dire

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[9] Even under this test, Petitioners' convictions could not stand because, as a matter both of fact and law, they did not "intend to further" or "adopt the goal" of Santacruz or Santacruz' narcotics operation by helping Santacruz spend his money on non-narcotics-related goods and activities.

need of clarification, as this case shows. Petitioners submit that, as a matter of law, they are not guilty of conspiracy to violate the racketeering law. As they argued below, RICO does not make a person guilty of conspiring to conduct a narcotics trafficking enterprise like a branch of the Cali Cartel when they furnish its leader with expensive goods and services, unrelated to drug activities, for the leader's personal consumption and enjoyment. The personal consumption goals of Santacruz, as the enterprise's head, are certainly not the same thing as "the operation or management of the enterprise itself." See United States v. Jackson, 935 F.2d 832, 841 (7th Cir. 1991) (distinguishing purchases for the purposes of maintaining defendant's lifestyle from purchases intended to promote continuing criminal enterprise.) Assisting or facilitating the leader's achievement of those goals thus does not further the criminal endeavor, and cannot make one a RICO conspirator.

The government attempted to elide that problem in the courts below by urging that the provision of these goods and services was, in fact, money laundering, which was an important component of the drug trafficking operation. And the Second Circuit appears to have accepted that claim, concluding that the evidence "support[s] the inference that the [Petitioners] conspired with Santacruz to aid his enterprise's drug business by money laundering." (App. 5) This facile assertion cannot validate the convictions.

First, the case as presented to the jury, did not limit the government's theory in this way. On the contrary, the government repeatedly argued to the jury that facilitating Santacruz' lavish lifestyle was itself the critical contribution to the enterprise being laid at the defendants' door. (Tr. 26, 1724-25, 1849-50) The trial court itself understood this to be the government's theory, commenting, at the close of the government's case that "[i]n the case of a major drug person of this kind maintaining this elaborate prince-like series of

establishments is part of the operation of the drug lord." (Tr. 1285)

Second, the actual facts of the case belie the claim that the consumption-related activities in which the defendants participated facilitated Santacruz' export of drug profits from the United States to Colombia. Most of the money delivered to the defendants after enactment of the money laundering statutes did not consist of cash generated in the United States, but of wire transfers from outside this country. This money had already been laundered and exported, and bringing it back to the United States to be spent on furnishing Santacruz' residences could not have furthered any money laundering aspect of the Cartel's operation. It could only have furthered Santacruz' personal efforts to spend his wealth, and his efforts not to put it back into his enterprise.

Third, the evidence in the case showed that Santacruz had an elaborate apparatus to launder the cash generated by his drug activities: a five stage written plan, created by a Harvard-trained economist, to export hundreds of millions of dollars in cash and launder it through banks and shell companies in South America and Europe. The purchase of luxury goods in the United States and Europe to furnish residences for his wife, his children, and his mistresses, was not part of that plan, or of the money laundering aspect of the Cali drug cartel. Besides, defendants' activities on behalf of Santacruz made no sense as a way of transporting assets to Colombia, for several reasons. Defendants charged too much to function as money launderers. The evidence in this case showed that professional money launders charged fees of four to ten percent; defendants charged a 30 percent commission for their services, standard charges for the services of designers, but far too much to pay to have money laundered. Moreover, that Santacruz' spending was just that, and was not a way to launder drug money, is evident from the expenditures themselves. The most expensive furnishings

designed or selected by the defendants were custom-designed items such as cabinetry and personalized dinnerware that contributed to Santacruz' personal enjoyment, but had little if any resale or asset value.[10]

Finally, the actual verdict the jury rendered refutes the claim that the jury convicted because it had found that the defendants engaged in "money laundering."[11]

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[10] Besides, the entire sum of money involved – less than $8 million over a 15 year period -- was insignificant as compared to the sums involved in Santacruz drug activities. The record reflects that during this period, Santacruz' employees would typically collect a "few million dollars" per week from a single one of his four American operations. (Tr. 141-42)

[11] The jury was charged that, to convict a defendant of substantive RICO, it had to find that there was an enterprise; that the defendant conducted or participated in the conduct of its affairs at some managerial level; that he participated though a pattern of racketeering activity; and that he committed at least two predicate acts within ten years of each other. (Tr. 1879-83) On the RICO conspiracy count, the jury was charged that, to convict, it must find that the defendant agreed to participate in the operation or management of the affairs of the enterprise in the same manner charged in the substantive RICO count, but that he need not have personally committed or agreed to commit any racketeering acts. (Tr. 1908)

In light of these instructions, and the jury's acquittal on the substantive count, it appears that the jury concluded that the defendants did participate in the operation or management of the affairs of the enterprise in the manner that Reves required, but that they did not commit racketeering acts. Accordingly, the jury's verdict would not permit affirmance of the conviction on the grounds that the evidence was sufficient to show that the

If Blarek's and Pellecchia's activities constituted money laundering, then money laundering has been redefined to include all market transactions between those who lead criminal enterprises and those who provide lawful goods and services to them. If that is so, then thousands of doctors, dentists, merchants and other business people and professionals are in serious jeopardy.

Petitioners therefore ask the Court to consider what the crimes of RICO conspiracy is, so that the sufficiency of the evidence can be tested against the proper legal standard. Evaluation of whether the evidence was legally sufficient to support the conspiracy conviction cannot even begin without a clear statement, permitting a clear understanding, of what it is the government must prove to establish that offense.[12]

Uncertainty and the opportunity to forum shop will continue until this Court rules. Even if Petitioners' position is to be rejected on the merits, this Court should do that sooner rather than later so that citizens will have notice of the activities and relationships which place them at risk. The court system, too, will benefit from prompt resolution of the question. Several Circuits have yet to decide whether Reves affects RICO conspiracy prosecutions. Cases brought in those districts will be conducted in an atmosphere of uncertainty, where the government, the defendant, and the court will have to guess what the operative law is.

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defendants aided the enterprise's drug business by committing two or more money laundering offenses. The jury seems to have found otherwise.

[12] If this Court agrees that the standard used by the Second Circuit was wrong, the appropriate remedy would be a remand.

Petitioners' case, which has been widely reported in the press, is an ideal one in which to consider the issue, for their situation puts the issue into stark focus, and their conviction leaves large numbers of professionals and other providers of goods and services at risk. Can a caterer cater the wedding of the daughter of an organized crime chief, or, in doing so, does she risk becoming part of a RICO conspiracy? Are lawyers or physicians at some risk when they provide professional services to such a client?[13]

Petitioners' defense at trial, and the primary thrust of their appeal, was that they agreed to, and did, provide professional design and decorating services to Jose Santacruz. The evidence, in the light most favorable to the government, showed that they did so even after they learned that he was a drug dealer, and knew that monies they were being paid for their services and for the home furnishings and related items they purchased on his behalf, may have come from drug dealing. In doing so, however, as the jury determined when it acquitted them of the substantive RICO charge, they did not manage, operate, or control the illicit enterprise that he headed, "the Santacruz Faction of the Cali Cartel." Nor, Petitioners submit, could they properly be convicted for conspiring to violate RICO.

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[13] Petitioners' "contribution" to the RICO enterprise is far more attenuated than the contribution made by a doctor or lawyer who renders services to a racketeer. If the doctor cures or the lawyer successfully defends the chief of a narcotics enterprise, he effectively puts the crime chief back into business. Petitioners did not facilitate the drug business at all, but only helped the criminal spend his money in a way that took it out of the narcotics business.

CONCLUSION

For the above-stated reasons, Petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of December December, one thousand nine hundred and ninety-eight.

PRESENT:

HON. THOMAS J. MESKILL,
HON. GUIDO CALABRESI,
Circuit Judges,

HON. MILTON POLLACK,
District Judge.[*]

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[*]The Honorable Milton Pollack, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

UNITED STATES OF AMERICA,
Appellee,

v.

SUMMARY ORDER
98-1291
98-1292

ANTHONY ALEXANDER BLAREK II and FRANK V. PELLECCHIA,
Defendants-Appellants,

Appearing for Appellants:	GERARD E. LYNCH, Howard, Smith & Levin, New York, NY
Appearing for Appellee:	MARK W. LERNER & RICHARD WEBER, Assistant United States Attorneys, Eastern District of New York, Brooklyn, NY

Appeal from the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Anthony Blarek II and Frank Pellecchia appeal from judgments entered on May 21, 1998, in the United States District Court for the Eastern District of New York (Weinstein, *J.*), which convicted them of RICO conspiracy in violation of 18 U.S.C. § 1962(d) and money laundering conspiracy in violation of 18 U.S.C. §§ 371 and 1956(h). Blarek also appeals from his

separate conviction for distributing the proceeds of a narcotics enterprise in violation of the Travel Act, 18 U.S.C. § 1952(a)(1).

I

Blarek and Pellecchia were interior designers and decorators. On a trip to Colombia in 1979, Blarek met Jose Santacruz, who controlled a large faction of the Cali cocaine cartel. Following their meeting, Santacruz hired Blarek to decorate his new home, and Blarek noted in his daily planner that he had "[m]ade the Colombian connection." Blarek claims that, at the time, he believed Santacruz was a legitimate businessman. In 1981, however, Blarek was questioned by DEA agents who informed him that Santacruz was a drug dealer.

Pellecchia became Blarek's business partner, and by 1985 the two designers worked exclusively for Santacruz. Over a period of several years, Blarek and Pellecchia purchased expensive objects such as art and furniture for Santacruz's office and numerous homes. The money for these purchases was given to the designers in large amounts of cash either wired from foreign bank accounts or delivered in duffel bags by anonymous couriers. The funds provided to Blarek and Pellecchia totaled several million dollars over the course of their relationship with Santacruz. The money spent by the designers came from drug proceeds.

Whenever Blarek and Pellecchia purchased items for Santacruz, they concealed the identity of their patron from vendors. The designers' accountant, Robert Rachlin, testified that in 1986 Blarek and Pellecchia told him "they had cash amounts, they wanted to conceal the fact that it was cash. They didn't want a money trail." Rachlin proceeded to convert Santacruz's cash into checks for the designers. Moreover, Blarek concedes that he filed false passport reports with the State Department and altered another passport in order to hide the

number of trips he had taken to Columbia. And, upon hearing of Santacruz's death in a shootout in 1996, a government informant recorded Blarek's musings about how the designers should go about covering up their links to the drug lord.

Blarek and Pellecchia were arrested in 1997, and safe deposit boxes in their names were found to contain over $750,000 in cash. Blarek admits that he lied to investigators on the day of his arrest, telling them that he never worked for Santacruz after he found out in 1991 that Santacruz was a drug lord, that there was no cash in the safe deposit boxes, and that he didn't remember whether he had ever received cash payments from Santacruz for his services.

The designers were indicted for substantive RICO in violation of 18 U.S.C. § 1962(c), RICO conspiracy in violation of 18 U.S.C. § 1962(d), and money laundering conspiracy in violation of 18 U.S.C. §§ 371 and 1956(h). Blarek was also charged separately with violating the Travel Act, 18 U.S.C. § 1952(a)(1). Blarek and Pellecchia's defense at trial was that they merely aided Santacruz in his personal consumption of lavish art and furnishings, and provided services no different from those that would be offered by any other interior decorators. Over defendants' objection, evidence was admitted of false statements they had made on their tax returns, underreporting improvements made on their home in an amount equal to the portion of the improvements that had been paid with Santacruz's cash. The jury acquitted Blarek and Pellecchia on the substantive RICO count, but convicted them for RICO conspiracy and money laundering conspiracy. It also convicted Blarek of violating the Travel Act.

II

Appellants' first claim is that the evidence was insufficient to support their RICO conspiracy conviction, and

that the spillover effect of the RICO conspiracy charge warrants the reversal of their other convictions.

"A defendant challenging the sufficiency of the evidence bears a heavy burden. We determine on review only if, viewed in the light most favorable to the government, there is substantial evidence to support the jury's findings." *United States v. Rastelli*, 870 F.2d 822, 827 (2d Cir. 1989) (citations omitted). "Furthermore, all issues of credibility must be considered to lie solely within the jury's province, and all reasonable inferences must be drawn in the government's favor." *Id.*

"A [RICO] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive [RICO] offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Salinas v. United States*, ___ U.S. ___, 118 S. Ct. 469, 477 (1997). The Appellants' position, both at trial and on appeal, is that they did not conspire with Santacruz but instead merely assisted him with his personal consumption. We disagree. There is considerable evidence in the record to show that the Appellants knew Santacruz was a drug dealer and that the money they were spending for him was drug money. Moreover, the size and manner of the cash transfers to Blarek and Pellecchia, not to mention the surreptitious conduct of the designers concerning their transactions with Santacruz, could all amply support the inference that the Appellants conspired with Santacruz to aid his enterprise's drug business through money laundering.

The Appellants emphasize that there are innocent explanations for most of the incriminating facts against them. For example, Blarek and Pellecchia argue that most interior decorators conceal the identity of their wealthy clients, and most transactions with such clients are conducted in cash. These arguments may be valid, but they were fully presented to the jury and necessarily rejected by the guilty verdict on the RICO

conspiracy charge. Furthermore, the jury evidently understood the defendants' theory of the case, since Blarek and Pellecchia were both acquitted of the more serious charge of substantive RICO. We will not second-guess the jury's guilty verdict on RICO conspiracy, and we therefore reject the sufficiency of the evidence claim as meritless.[1]

Appellants' second claim is that the federal money laundering statute, 18 U.S.C. § 1957(a) (1994), is unconstitutionally vague as applied to them and therefore cannot serve as a predicate act for their RICO conspiracy conviction. Section 1957(a) states, in pertinent part: "Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity[] shall be punished." Blarek and Pellecchia contend that the phrase "criminally derived property" is so broad that it failed to provide them with adequate notice.

It is, of course, settled law that "a challenger who engages in some conduct that is clearly proscribed . . . cannot complain of the vagueness of the law as applied to the conduct of others." *United States v. Amer*, 110 F.3d 873, 878 (2d Cir.), *cert. denied* 118 S. Ct. 258 (1997) (internal quotation marks and citations omitted). And even if a phrase in a statute might be vague as applied to extreme situations, that fact does not make the statute void for vagueness when a defendant's conduct falls within the core of the statute. *See id.*

In this case, there is no doubt that Blarek and Pellecchia were aware that the cash they received from Santacruz was "criminally derived property" from drug dealing. It is also clear

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[1] Since we conclude that the RICO conspiracy conviction was supported by sufficient evidence, Appellants' claim of prejudicial spillover is without merit.

that the term "criminally derived property" covers money earned from drug trafficking and then directly provided to a defendant by a drug trafficker. As a result, the Appellants cannot argue that § 1957(a) failed to provide adequate notice to them. Their void-for-vagueness challenge to § 1957(a) is, therefore, without merit.

Third, the Appellants contend that they did not violate the Travel Act, 18 U.S.C. § 1952(a)(1), either as a predicate act for RICO conspiracy, or, in Blarek's case, also as a separate offense. Section 1952(a) states, in pertinent part: "Whoever travels in interstate or foreign commerce . . . with intent to . . . distribute the proceeds of any unlawful activity" is guilty of a violation. Appellants again argue that they were only shopping for Santacruz and not distributing the proceeds of unlawful activity. This claim is without merit. As we noted earlier, Blarek and Pellecchia did not just shop and haggle for Santacruz. They, in fact, engaged in a systematic effort to assist the Santacruz enterprise by turning large sums of tainted cash into chattels that the drug lord could safely enjoy. We find that there was sufficient evidence to support the jury's finding that Blarek and Pellecchia distributed the proceeds of unlawful activity in violation of § 1952(a)(1).

Finally, the Appellants contend that the district court erred by admitting certain false statements they made on their tax returns into evidence. As the district court explained to the jury, the tax return statements were offered "solely in support of [the government's] claim that there was cash involved and that this was the way of covering up the cash that they were receiving." We find no error in the admission of this evidence.

We have considered all of Blarek and Pellecchia's arguments and find them to be without merit. The judgment of the district court is therefore affirmed.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform--

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act

which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. § 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever

is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statemen or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, or destruction of property by means of explosive or fire;

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978 [FN1];

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating

to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to fraudulent Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280

(relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code,, [FN2] a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), secti 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(F) Any act or activity constituting an offense involving a Federal health care offense.

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are--

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section--

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

Supreme Court, U.S.
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No. 98-1391

In the Supreme Court of the United States

OCTOBER TERM, 1998

ANTONY ALEXANDER BLAREK, II, AND
FRANK V. PELLECCHIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the RICO conspiracy provision, 18 U.S.C. 1962(d), requires proof that a defendant agreed to personally participate in the operation or management of a criminal enterprise.

2. Whether the evidence is sufficient to show that petitioners agreed to facilitate a RICO violation by laundering the illicit proceeds of a drug-trafficking enterprise.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unpublished, but the decision is noted at 166 F.3d 1202 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1998. The petition for a writ of certiorari was filed on March 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were

each convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); and conspiring to commit money laundering, in violation of 18 U.S.C. 371 and 1956(h). In addition, Blarek was convicted of distributing the proceeds of a narcotics enterprise, in violation of 18 U.S.C. 1952(a)(1). Blarek was sentenced to 68 months' imprisonment, to be followed by a three-year term of supervised release, and fined $305,186. Pellecchia was sentenced to 48 months' imprisonment, to be followed by a three-year term of supervised release. The district court also ordered both petitioners to forfeit cash and assets. The court of appeals affirmed. Pet. App. 1-7; Gov't C.A. Br. 1-2.

1. Petitioners Blarek and Pellecchia were interior designers and decorators. In 1979, Blarek met Jose Santacruz, a leader of the Cali cocaine cartel. Santacruz hired Blarek to decorate his new home, and Blarek noted in his daily planner that he had "[m]ade the Colombian connection." In 1981, Drug Enforcement Administration agents informed Blarek that Santacruz was a drug dealer. Pet. App. 3.

Blarek became a business partner of Pellecchia, and by 1985 the two designers worked exclusively for Santacruz. During a period of several years, petitioners purchased expensive art and furniture for Santacruz's office and homes. Petitioners received the money for those purchases in the form of cash that was either wired from foreign bank accounts or delivered in duffel bags by anonymous couriers. During the course of their relationship with Santacruz, petitioners received several million dollars for their purchases on behalf of Santacruz. That money constituted the proceeds of illegal drug transactions. Pet. App. 3.

When petitioners purchased items for Santacruz, they concealed the identity of their patron from vendors. In 1986, petitioners told their accountant that they "had cash amounts, they wanted to conceal the fact that it was cash. They didn't want a money trail." The accountant then converted Santacruz's cash into checks for petitioners. Blarek filed false passport reports with the State Department and altered another passport in order to conceal the number of trips he had taken to Colombia. In 1996, after learning that Santacruz had been killed, Blarek told a government informant how petitioners would cover up their connections to Santacruz. Pet. App. 3-4.

After petitioners were arrested in 1997, their safe deposit boxes were found to contain more than $750,000 in cash. By his own admission, Blarek lied to investigators on the day of his arrest when he claimed that he never worked for Santacruz after learning in 1991 that Santacruz was a drug dealer, that there was no cash in the safe deposit boxes, and that he did not remember whether he had ever received cash payments from Santacruz for his services. The jury found petitioners guilty of RICO conspiracy, in violation of 18 U.S.C. 1962(d), and conspiring to commit money laundering, in violation of 18 U.S.C. 371 and 1956(h). Pet. App. 4.

2. The court of appeals affirmed. Pet. App. 4-7. In reviewing the sufficiency of the evidence supporting petitioners' RICO conspiracy convictions, the court applied the holding in *Salinas* v. *United States*, 522 U.S. 52, 65 (1997), that a RICO conspirator "must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive [RICO] offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." Pet. App. 5. The court rejected petitioners' contention that

the evidence showed that they had not conspired with Santacruz but merely assisted him in his personal consumption. The court explained that "[t]here is considerable evidence in the record to show that [petitioners] knew Santacruz was a drug dealer and that the money they were spending for him was drug money." *Ibid.* The court added that "the size and manner of the cash transfers to [petitioners], not to mention the surreptitious conduct of [petitioners] concerning their transactions with Santacruz, could all amply support the inference that [petitioners] conspired with Santacruz to aid his enterprise's drug business through money laundering." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 7-14) that the RICO conspiracy provision, 18 U.S.C. 1962(d), requires proof that they agreed to personally participate in the operation or management of a criminal enterprise. In making that argument, petitioners rely on *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993), which holds that "one is not liable under [a substantive RICO provision, 18 U.S.C. 1962(c)] unless one has participated in the operation or management of the enterprise itself."

This Court's decision in *Salinas* v. *United States*, 522 U.S. 52, 64 (1997), disposes of petitioners' contention. In that case, Salinas argued that a defendant cannot be liable for a RICO conspiracy offense, "unless he himself committed or agreed to commit the two predicate acts requisite for a substantive RICO offense under § 1962(c)." *Id.* at 61. The Court rejected that contention, holding that proof that Salinas's co-conspirator committed two predicate acts and that Salinas knew about the acts and agreed to facilitate them was sufficient to establish that Salinas violated the RICO

conspiracy provision. *Id.* at 65-66. In reaching that conclusion, the Court relied on "well-established principles" of conspiracy law. *Id.* at 63. In particular, the Court explained that, under general conspiracy law principles, "[i]f conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators." *Id.* at 64. The Court added that "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at 65.

The well-established conspiracy law principles on which the Court relied in *Salinas* are equally applicable to RICO's "operation or management" requirement. In order to establish that petitioners violated the RICO conspiracy provision, it is not necessary to show that petitioners agreed to operate or manage a criminal enterprise themselves. Instead, it is sufficient to show that petitioners agreed to facilitate a co-conspirator's operation or management of such an enterprise. Consistent with that analysis, four courts of appeals have held that a defendant may be convicted of a RICO conspiracy without proof that he agreed to operate or manage the criminal enterprise himself. *United States* v. *Viola*, 35 F.3d 37, 42-43 (2d Cir. 1994), cert. denied, 513 U.S. 1198 (1995); *United States* v. *Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998), cert. denied, 119 S. Ct. 1280 (1999); *United States* v. *Quintanilla*, 2 F.3d 1469, 1484-1485 (7th Cir. 1993); *United States* v. *Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995), cert. denied, 517 U.S. 1111 (1996).

As petitioners note (Pet. 10-12), the Third and Ninth Circuits have held that the RICO conspiracy provision

requires proof that the defendant agreed to personally participate in the operation or management of the enterprise. *United States* v. *Antar*, 53 F.3d 568, 581 (3d Cir. 1995); *Neibel* v. *Trans World Assurance Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997). *Antar* and *Neibel*, however, were both decided before this Court's decision in *Salinas*, and the Third and Ninth Circuits have not yet evaluated the impact of *Salinas* on those decisions. The Third Circuit granted rehearing en banc in *Klein* v. *Boyd*, No. 97-1143, 1998 WL 55245 (March 9, 1998), to reconsider *Antar* in light of *Salinas*, but the case was settled and the suit was dismissed before the en banc court issued a decision. The Ninth Circuit has a case pending before it in which the United States is arguing that *Neibel* is inconsistent with *Salinas* and therefore should no longer be followed. See U.S. Br. at 27-37, *United States* v. *Luong*, No. 99-10009 (filed Feb. 8, 1999). Because *Salinas* makes clear that the RICO conspiracy provision does not require proof that the defendant agreed to personally operate or manage a criminal enterprise, and because there is no post-*Salinas* conflict on that issue, this Court's review of that question is not warranted.

2. Petitioners alternatively contend (Pet. 14-15) that the RICO statute does not make it illegal to provide the leader of a drug trafficking enterprise with expensive goods and services for his personal consumption. Petitioners, however, did not simply facilitate Santacruz's enjoyment of a lavish lifestyle. As the court of appeals explained (Pet. App. 5), the evidence in this case establishes that petitioners aided Santacruz's drug business by laundering large sums of drug money. Money laundering is an integral component of a drug trafficking enterprise. See *United States* v. *Coiro*, 922 F.2d 1008, 1017 (2d Cir.), cert. denied, 501 U.S. 1217 (1991); *United*

States v. *Barns*, 604 F.2d 121, 154-155 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

Petitioners argue (Pet. 15-16) that the government did not rely on a money laundering theory at trial. Allegations in the indictment, however, clearly set forth the government's theory that petitioners advanced the RICO enterprise by engaging in money laundering (Intro., ¶¶ 13-16; Count 1, ¶¶ 19-20). And, in its closing argument, the government repeatedly emphasized that petitioners' participation in the enterprise consisted of acts of money laundering. See, *e.g.*, Tr. 1722 ("these defendants designed a scheme with Santacruz to conceal, to wash, to clean part of his drug fortune"); Tr. 1723 ("What this case is really about is how these defendants and Santacruz conspired and acted to conceal and disguise the true source and ownership of millions of dollars of merchandise sent to Colombia for Santacruz' use and benefit."); Tr. 1726 ("The evidence submitted during this trial concerns * * * how [the defendants] managed the area of purchasing and concealment of drug money.").

Petitioners claim (Pet. 16-17) that most of the money delivered to them by Santacruz had already been laundered, and that Santacruz had an elaborate apparatus, not involving petitioners, to launder the cash generated by his drug trafficking. To the extent the money received by petitioners had already been laundered, however, Santacruz needed to convert the money into a form in which he could use it. Petitioners, knowing that the wire transfers consisted of the proceeds of illegal drug trafficking, provided Santacruz with a means to do so. And, while petitioners laundered only a fraction of Santacruz's enormous drug profits, the fact remains that they laundered millions of dollars for him.

Petitioners finally argue (Pet. 17 & n. 11) that their acquittal on the substantive RICO count suggests that the jury found that they did not engage in money laundering. That acquittal, however, could have been based on any number of grounds, including the jury's decision to exercise leniency. See *United States* v. *Powell*, 469 U.S. 57, 65 (1984). It therefore provides no basis for petitioners' contention that the jury found insufficient evidence of money laundering. Significantly, the jury found petitioners guilty of conspiring to engage in money laundering, verdicts that are entirely consistent with the jury's finding that petitioners conspired to violate RICO by laundering Santacruz's drug proceeds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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--against--

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS' REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

1. The government studiously avoids meeting the petition for certiorari head on, declining to take a position on a critical question that this case presents: "whether RICO is violated by one who provides the leader of a drug trafficking enterprise with expensive goods and services for his personal consumption." Government's Brief at 6. The government asserts that the Petitioners "did not simply facilitate Santacruz's enjoyment of a lavish lifestyle," Government's Brief at 6, and cites, in support of this assertion, the Second Circuit's conclusion that there was evidence at trial that "Petitioners aided Santacruz' drug business by laundering large sums of drug money." Id.

The government's argument (which the Second Circuit adopted) should be rejected because it is circular: it rests on the premise that providing a drug trafficker with expensive goods and service, thus enabling him to enjoy his ill gotten gains, is itself "money laundering."[1] That this is so is patent from the government's response to the Petitioners' claim that they did not function as money launderers because the money they received -- wire transfers from outside of the United States -- had already been laundered. The government responds that, "To the extent the money received by Petitioners had already been laundered, however, Santacruz needed to convert the money into a form in which he could use it." Government's Brief at 7. This is just word-play. Petitioners did not "convert [Santacruz'] money into a form in which he could use it;" it was already in that form. Petitioners converted that money into goods and services for Santacruz. In other words, they helped him spend his money on luxury goods and professional services for his and his loved

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[1] Nothing in the Second Circuit's Opinion suggests that it repudiated that premise or affirmed the conviction on a narrower theory of money laundering.

ones' enjoyment.

When all is said and done, then, this case squarely presents the issue the government attempts to avoid. This conviction does not rest on proof that the Petitioners agreed to, or did, launder money for the Cali drug cartel within the meaning of the federal money laundering laws. It rests on the very broad, and very dangerous, theory that receiving money from, or spending money for, a drug trafficker in connection with a commercially reasonable buyer-seller or professional-client relationship itself constitutes "money laundering" that can support a RICO conviction. Because there is no reason to distinguish between drug traffickers and others whose criminal endeavors may be prosecuted under RICO, this case stands for the proposition that anyone who provides goods or services to a person he knows or has reason to know is engaged in criminal activities may be prosecuted for, and convicted of, RICO conspiracy on the theory that he helped that person enjoy the fruits of his crimes.[2] For that reason alone, certiorari should be granted.

2. The government concedes that there is a split in the Circuits as to the scope of conspiratorial liability under RICO, but insists that the split is not significant because neither the Ninth or Third Circuit has considered the issue of conspiratorial liability under RICO, since this Court's ruling in Salinas v. United States, 522 U.S. 52, 118 S. Ct. 469 (1997). The

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[2] The government misunderstands the significance of the jury's refusal to convict on the substantive RICO count. While it is true, as the government contends, that that acquittal may have been based on any number of grounds, in light of that acquittal it cannot be said that the jury found that either of the Petitioners – or anyone else – engaged in any of the substantive acts of money laundering set forth as predicate acts in the indictment's substantive RICO count.

government does not contend that the Circuits, with the exception of the Third and the Ninth, are completely in accord. As the Petition for Certiorari demonstrates, they are not.

Salinas itself does not resolve the question that has so divided the Courts of Appeals. Salinas rejected the proposition that a RICO conspirator must agree personally to commit two or more predicate acts, and reached that conclusion in reliance upon "well-established [conspiracy] principles." 522 U.S. at ___, 118 S. Ct. at 477. But neither the Salinas decision, nor general principles of conspiracy law, provide an answer to the question what an alleged co-conspirator must agree to in order to be guilty of RICO conspiracy. Indeed, Salinas itself can be read to support a narrow delineation of conspiratorial liability under RICO. Salinas, after all, confirms that, "The partners in the criminal plan must agree to pursue the same criminal objective ..." 522 U.S. at _____, 118 S. Ct. at 477 (emphasis added). Petitioners were charged with having conspired to conduct or participate in the conduct of an enterprise – the Santacruz faction of the Cali narcotics cartel. Yet it is farfetched in the extreme to infer from the evidence that was presented that these interior designers "agree[d] to pursue" the "same criminal objective[s]" held by Santacruz, that is, to traffic in drugs with him and his confederates.

Even if such an inference could properly be drawn, surely, it should not be assumed that the Salinas Court, which did not even mention Reves v. Ernst & Young, 507 U.S. 170 (1993), intended to eviscerate the Reves decision by blanketly approving prosecutions and convictions of individuals for RICO conspiracy, where the conspiratorial objectives have been fully realized but the individual could not, under Reves, be convicted of the substantive RICO offense.[3]

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[3] Under the sentencing guidelines, for sentencing purposes, there is no difference between conspiracy and the

Thus, the government's assertion to the contrary notwithstanding, Salinas does not "make clear" that the RICO conspiracy provision requires no "proof that the defendant agreed to operate or manage a criminal enterprise." Government's Brief in Opposition at 6. Salinas directs that general conspiracy principles be applied, but the application of those principles in the context of a multilayered RICO offense is hardly obvious, as the cases discussed in the Petition show.

Nor is there a compelling reason for the Court to wait until the Circuit Courts have all had a chance to consider this issue in light of Salinas. As the government's own brief shows, there is no case even pending before the Third Circuit which presents the question. Nor is there any guarantee that the question will be answered by the Ninth Circuit in United States v. Luong, No. 99-10009. Furthermore, even if there were no conflict in the Circuits, review by this Court would be warranted because permitting convictions for RICO conspiracy of those who could not be convicted of substantive RICO is fundamentally at odds with Reves, and, Petitioners submit, contrary to Congress' intent in enacting the RICO statutes.

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substantive crime which is the object of the conspiracy, unless the conspiracy does not come close to or reach fruition. See U.S.S.G. § 2X1.1(a), (b)(2).

CONCLUSION

For the reasons stated here and in the Petition for Certiorari, Petitioners respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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